Office-Supreme Court, U.S.
FILED
AUG 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1799

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES BURKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly declined to order production of a reporter's notes and records when the reporter himself testified at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 700 F.2d 70.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1983, and a petition for rehearing was denied on March 8, 1983. The petition for a writ of certiorari was filed on May 4, 1983. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to conduct an enterprise through a pattern of racketeering activity (18 U.S.C. 1962(d)), conspiracy to commit sports bribery (18 U.S.C. 224), and interstate travel

to commit bribery (18 U.S.C. 1952).[1] He was sentenced to 20 years' imprisonment. The court of appeals affirmed. Pet. App. 1a-28a.

1. The evidence at trial showed that petitioner, along with Henry Hill and co-defendants Paul Mazzei, Rocco and Anthony Perla, and Richard Kuhn conspired to "shave points" from the Boston College (B.C.) basketball team's scores in the 1978-1979 season in order that the conspirators might profit from betting on games. The Perla brothers began the scheme by recruiting Kuhn, who was about to begin his senior year at B.C. and was a key member of the basketball team. Kuhn agreed to ensure that B.C.'s point total fell below the gambling "point spread," or expected margin of victory.[2] The Perla brothers then contacted Mazzei; through Mazzei, they contacted Hill, who reputedly was an underworld figure. The Perla brothers and Mazzei hoped that Hill would obtain protection from petitioner —Hill's underworld "boss" — in the event that bookmakers discovered that they were being swindled and sought retribution. Pet. App. 3a-4a.

In November 1978, petitioner, Hill, Mazzei, and Tony Perla met, and petitioner and Hill joined the scheme. Pet. App. 4a; Tr. 218-220, 235-236.[3] At petitioner's direction,

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[1]Co-defendants Anthony and Rocco Perla and Richard Kuhn were convicted on the same charges, and their convictions were affirmed with petitioner's. Co-defendant Paul Mazzei's conviction was affirmed separately (*United States* v. *Mazzei*, 700 F.2d 85 (2d Cir. 1983)), and this Court denied certiorari (No. 82-6449 (May 23, 1983)).

[2]Because gamblers betting on college basketball games generally bet not that a particular team will win but that it will win by the number of points designated by a uniform betting "line" established by bookmakers, the knowledge that B.C. would always do somewhat worse than expected would be valuable to bettors. See Pet. App. 3a n.2.

[3]We rely on the brief filed by the United States Attorney in the court of appeals for citations to the trial transcript.

Hill, Mazzei, and Tony Perla then met with Kuhn to plan the scheme. They agreed that the Providence game on December 6, in which B.C. was favored by six points, would be their first point shaving effort. Pet. App. 4a. But the conspirators lost their bets on that game when B.C. won by 19 points. As a result, the group decided to recruit additional B.C. players. Ernie Cobb, the team's leading scorer, agreed to participate (*id.* at 4a-5a), and when petitioner learned of Cobb's cooperation, he gave Hill $5,000 to pay Kuhn and Cobb. Tr. 269.

B.C. was favored to win its next game, against Harvard, by 12 points but instead won only by three points; the bettors, having succeeded, paid Kuhn for his efforts. The conspirators also won their bets on B.C.'s next game, a loss to U.C.L.A. by more than the designated point spread; this was the first game in which the players agreed to lose by more than expected (as opposed to holding down B.C.'s score in games it won). Pet. App. 5a & n.3. Petitioner bet on U.C.L.A. Tr. 278. After similar success in a January 10, 1980, game against Rhode Island, petitioner and Hill concluded that bookmakers were likely to become suspicious of them, and they decided to bet on B.C. to win by more than the point spread in a game they were confident that B.C. would win handily. Pet. App. 5a; Tr. 287-288. The January 17 University of Connecticut game proved successful in this respect for the conspirators. Pet. App. 5a.

They then returned to their original strategy for B.C.'s games against Fordham, St. John's, and Holy Cross. The Holy Cross game, a televised traditional rivalry, attracted the heaviest betting. When Mazzei said that the B.C. players had agreed to lose the Holy Cross game, petitioner bet heavily on Holy Cross. Pet. App. 6a; Tr. 297, 300. Tony Perla told Kuhn that if the conspirators won their bets on

the Holy Cross game, the players would each receive $10,000. Tr. 957-958. B.C. lost, but by less than the point spread, so petitioner and the others lost their bets. Pet. App. 6a.

The scheme unraveled when Hill was indicted on other charges by New York authorities. In the course of questioning on those charges, Hill said that he had participated in a point shaving scheme involving the B.C. basketball team. He offered to relate everything he knew about it if federal officials would guarantee him immunity on such charges and would intercede on his behalf in his state prosecution. Pet. App. 6a-7a.

2. Before the trial, Hill described the conspiracy to Douglas Looney, a reporter for *Sports Illustrated*. Robert Simels, Hill's attorney, was present at each interview between Looney and Hill. In February 1981, the magazine published a story by Looney based on Hill's account. Pet. App. 8a, 11a-12a n.8.

Petitioner served a subpoena on Time, Inc., *Sports Illustrated*'s parent company, seeking virtually every record, note, or tape concerning Looney's article. Time moved to quash the subpoena, arguing that it abridged the reporter's First Amendment privilege and that it was overbroad. The district court granted the motion to quash, ruling that petitioner could renew his request after Hill testified at trial. Pet. App. 8a.

Hill testified at the trial, incriminating petitioner and the other defendants. The defendants vigorously sought to impeach Hill. They brought to light his extensive criminal background; they also showed that the government had entered into an immunity agreement with Hill in return for his testimony. In addition, the district court, over Time's

objection, ordered Looney to testify. Looney related various inconsistencies between the account Hill had given him and Hill's testimony at trial. Pet. App. 9a.

After Hill testified, the district court again granted Time's motion to quash the subpoena for records. The court noted that the only purpose for which petitioner sought these documents was to impeach Hill; the court ruled that in view of the abundant material available for that purpose, including Looney's testimony, the documents would be only cumulative. In addition, petitioner made no effort to subpoena Simels — a possible alternative source of any impeaching material contained in the subpoenaed documents — even though Simels could have testified about the conversations between Hill and Looney without violating the attorney-client privilege. Pet. App. 9a, 11a-12a n.8.

3. The court of appeals rejected petitioner's contention that the district court erred in not ordering the production of the *Sports Illustrated* documents or reviewing them in camera. Pet App. 8a-13a. The court of appeals agreed with the district court that petitioner "completely failed to make the clear and specific showing that these documents were necessary or critical to the maintenance of his defense." *Id.* at 11a. The court of appeals noted that in previous cases it had ruled that because of " 'the important interests of reporters and the public in preserving the confidentiality of journalists' sources, disclosure may be ordered only upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources.' " *Id.* at 9a, quoting *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982). Because of the wealth of other material petitioner used to impeach Hill, and because Looney testified — and Simels could have

testified, had petitioner subpoenaed him — about Hill's conversations with Looney, the court ruled that petitioner had not made the necessary showing.

ARGUMENT

Rule 17(c), Federal Rules of Criminal Procedure, provides that a court may quash a subpoena "if compliance would be unreasonable or oppressive." This Court has held that a district court may use its authority to quash in order to restrict Rule 17(c) subpoenas to "evidentiary" materials and to prevent them from becoming "an additional means of discovery." *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 219-220 (1951). Here, the district court concluded that in view of the abundant material petitioner could have used, and did use, to impeach Hill — including the reporter's testimony — compliance with petitioner's sweeping subpoena duces tecum was unnecessary. The court of appeals agreed with that determination, which was manifestly reasonble and, in any event, depends on the particular facts of this case and therefore does not warrant this Court's review.

Petitioner does not deny that he sought the documents from Time solely because he wished to use them to impeach Hill. Nor does he deny that a vast amount of other impeaching material was available; indeed, much of the petition is devoted to a recitation of reasons for disbelieving Hill that were developed at trial. See, *e.g.*, Pet. 4 n.4, 10-13. Petitioner also does not explain why the documents he subpoenaed would have aided in his defense; if petitioner wished to identify inconsistencies between the account Hill gave to Looney in the course of writing the magazine article and the account Hill gave at trial, Looney's own testimony would appear to have been more than adequate.

Instead, petitioner appears to contend that the court of appeals and the district court erred in allowing "First Amendment" concerns to enter into the decision whether to quash the subpoena. Pet. 18. But in making the necessarily discretionary determination required by Rule 17, a judge will frequently assess the extent to which a subpoena unreasonably burdens the custodian of the subpoenaed documents. When that burden falls on interests that implicate the First Amendment, nothing in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), precludes the court from taking that factor into account as well. See *id.* at 707 ("news gathering is not without its First Amendment protections"); *id.* at 710 (Powell, J., concurring) ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1983

DOJ-1983-08